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No. 93-1540

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS H. MCNICHOLS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether imposition of the federal income tax, interest, and additions to tax owed on illegally derived income violates the Fifth or Eighth Amendments to the United States Constitution when certain of the assets presumably derived from that income were subsequently forfeited to the United States pursuant to a plea agreement in a separate criminal proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 13 F.3d 432. The opinion of the Tax Court (App., *infra*, 1a-10a) is reported unofficially at RIA T.C. Memo ¶ 93,061.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1993. The petition for a writ of certiorari was filed on March 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The petition for a writ of certiorari does not include a copy of the Tax Court opinion, which is therefore set forth as an appendix to this brief.

STATEMENT

1. During 1981 and 1982, petitioner unlawfully imported and distributed marijuana in the United States. Through these illegal activities, petitioner earned approximately $503,500 in 1981 and $906,065 in 1982 (App., *infra*, 2a). He willfully failed to report this income on his tax returns for those years (*id.* at 3a).

Petitioner was subsequently indicted for numerous crimes, including distribution of marijuana (21 U.S.C. 841(a)(1)), racketeering (18 U.S.C. 1962(c)), conspiracy to engage in racketeering (18 U.S.C. 1962(d)), and subscribing to false income tax returns for the years 1981, 1982 and 1983 (26 U.S.C. 7206(1)). Pet. App. 3. The indictment further charged that petitioner had acquired various assets that were subject to forfeiture to the United States as "property constituting, or derived from," the proceeds of his racketeering activity (18 U.S.C. 1963(a)(3)). Pursuant to a plea agreement made in June 1988, petitioner pled guilty to all charges against him. He further agreed to "forfeit all right, title and interest" that he held "in the properties described in the indictment" and "in any monies held in any foreign bank accounts * * * in his name or on his behalf" (Pet. App. 3-5).

2. In February 1988, before the plea agreement was entered, the Commissioner of Internal Revenue asserted deficiencies in income tax against petitioner with respect to his unreported income from illegal activities, in the amounts of $251,228 for 1981 and $453,025 for 1982 (Pet. App. 6; App., *infra*, 1a). The Commissioner also asserted additions to tax for 1981 under 26 U.S.C. 6653(b) (1976), for a substantial understatement of income tax liability for 1982 under

26 U.S.C. 6661 (1982), and for fraud under 26 U.S.C. 6653(b)(1) and (2) (1982). Pet. App. 6-7.

3. Petitioner sought review of the asserted deficiencies, interest, and additions to tax in the Tax Court. The parties entered into a stipulation of facts in which petitioner conceded that he had "derived taxable income and incurred costs from the importation and sale of marijuana," that he "did not report any of the taxable income received or costs incurred from the sale of marijuana * * * on his federal income tax returns for [the 1981 and 1982] taxable years," that he had "fraudulently, and with intent to evade tax omitted taxable income from his federal tax returns for the * * * taxable years 1981 and 1982" and that "[a] part of the underpayments of tax * * * for the taxable years 1981 and 1982 was due to fraud" (Pet. App. 6). Petitioner contended, however, that taxing the income he had derived from his illegal drug activities violates the Fifth and Eighth Amendments to the Constitution because, under the plea agreement for his criminal charges, he had forfeited to the government various assets that emanated from the illegal income that the government sought to tax (App., *infra*, 8a). Petitioner asserted that taxing the forfeited income, in addition to the forfeiture itself, constitutes an excessive fine (*ibid.*).

The Tax Court upheld the Commissioner's determinations (App., *infra*, 1a-10a). The court held that the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment were not implicated in this context because "the various forfeitures to which [petitioner] has been subjected relate to conviction for crimes separate and distinct from" the actions that gave rise

to the additions to tax involved here (*id.* at 8a). The court noted that "the tax crimes for which [petitioner] was convicted were for subscribing to false tax returns under section 7206(1), which is a different crime from tax evasion" (*id.* at 9a). The court further held that the Double Jeopardy Clause and the Excessive Fines Clause do not apply to petitioner's case because the taxes, interest, and additions to tax at issue do not constitute punishment (*ibid.*).

4. The court of appeals affirmed (Pet. App. 1-19). The court rejected petitioner's contention that, under *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the imposition of tax, interest and penalties violates the Excessive Fines Clause of the Constitution (Pet. App. 8-12). The court found *Austin* to be inapplicable to this case because *Austin* did not involve the imposition of civil taxes, interest and penalties upon income but instead concerned whether *forfeitures* constitute a form of punishment to which the limitations of the Excessive Fines Clause of the Eighth Amendment apply (*id.* at 10-11). The court noted that there is "an insurmountable wall of tax cases * * * holding that the government has a right to do precisely what it has done here" (*id.* at 10). The court further noted that, unlike the situation in *Austin*, petitioner had consented to the forfeiture in this case (*id.* at 10, 11).

The court of appeals also rejected petitioner's argument that, under *United States* v. *Halper*, 490 U.S. 435 (1989), the imposition of tax, interest and penalties violates the Fifth Amendment proscription against multiple punishments (Pet. App. 12-15). The court pointed out that, in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), this Court concluded that additions to

tax are not punishment but are remedial in character (Pet. App. 15), and that, in *James* v. *United States*, 366 U.S. 213 (1961), the Court held that taxpayers are liable for income tax on illegal income regardless of whether they are also liable to restore its equivalent (Pet. App. 16).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Section 61(a) of the Internal Revenue Code, gross income includes "all income from whatever source derived." 26 U.S.C. 61(a). It is well settled that "unlawful, as well as lawful, gains are comprehended within the term 'gross income.'" *James* v. *United States*, 366 U.S. 213, 218 (1961) (opinion of Warren, C.J.). The fact that illegal gains represent "income" is not altered by the fact that the criminal may at some point be required to restore the proceeds of the crime to another. See *id.* at 218-221 (opinion of Warren, C.J.). From the time that petitioner received income from illegal sources in 1981 and 1982 until he forfeited various assets that he held in 1988, petitioner unquestionably enjoyed sufficient command and control over the income to be subject to tax on it. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). This Court has refused to sanction "the injustice of relieving [criminals] of the duty of paying income taxes on the money they enrich themselves with through [crime] while honest people pay their taxes on every conceivable type of income."

James v. *United States*, 366 U.S. at 221 (opinion of Warren, C.J.).

b. As the Tax Court held (App., *infra*, 8a-9a), imposing such a tax does not violate the Excessive Fines Clause of the Eighth Amendment or the Double Jeopardy Clause of the Fifth Amendment. Petitioner's civil tax liability existed, of course, simply because he received "income," not because that income had been derived illegally. 26 U.S.C. 61(a). Similarly, the interest owed on petitioner's tax liability existed solely because the taxes were not paid promptly when due. And, in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), this Court held that additions to tax and civil penalties for tax fraud are not "punishment" but are compensatory and remedial charges imposed "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401.[2]

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[2] In *Helvering* v. *Mitchell*, the taxpayer asserted that the assessment of an addition to tax for fraud was punishment that —because he had previously been acquitted of criminal charges of willfully attempting to evade tax—was precluded by the Double Jeopardy Clause of the Fifth Amendment. The Court rejected that contention, holding that additions to tax are not penal in character. 303 U.S. at 401. Petitioner errs in asserting that *Helvering* v. *Mitchell* is inapposite here because petitioner has "already forfeited over $1,000,000.00 to the Government to satisfy costs and delinquent tax payments" and has "served a substantial prison sentence as punishment for his crime" (Pet. 31-32). When, as here, the objective of the subsequent action is remedial rather than punitive, double jeopardy does not apply even when the prior criminal action involved the same facts that are the basis for the civil liability. See *Helvering* v. *Mitchell*, 303 U.S. at 398-399. Moreover, petitioner

The Double Jeopardy Clause prohibits only *punishing* twice. It does not preclude both penal and remedial actions with respect to the same act. See *United States* v. *Halper*, 490 U.S. 435, 446 (1989). A civil tax or addition to tax or penalty that is remedial and compensatory also cannot be an excessive fine for purposes of the Eighth Amendment, the focus of which is on punishment. See *Austin* v. *United States*, 113 S. Ct. 2801, 2806, 2812 n.14 (1993). Neither the Fifth nor Eighth Amendment thus precludes petitioner's civil liability for income tax, interest and additions to tax.[3]

2. This case does not, as petitioner suggests (Pet. 38-43), conflict with *United States* v. *Halper*, 490 U.S. 435 (1989). In *Halper*, the defendant submitted 65 false claims to Blue Cross and Blue Shield of New

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has conceded that the forfeitures in this case resulted from crimes that were "not related to tax evasion but to drug trafficking" (Pet. 32).

[3] Petitioner errs in asserting that the imposition of tax, interest and additions to tax is punishment because "it is difficult to conceive of any overriding interest of the federal government besides financial gain, or further punishment by retribution or deterrence" (Pet. 20). A tax deficiency "clearly aims not to punish [a taxpayer] but to force him to pay taxes due and owing." *Traficant* v. *Commissioner*, 884 F.2d 258, 263 (6th Cir. 1989). A taxpayer sentenced to imprisonment and fined after conviction in a criminal matter is punished for the commission of a crime, and is not thereby relieved of his obligation to pay taxes due. See *Ianniello* v. *Commissioner*, 98 T.C. 165, 179 (1992). As this Court has explained, additions to tax are provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the expenses of investigation and for the loss resulting from the taxpayer's neglect or deceit. *Helvering* v. *Mitchell*, 303 U.S. at 401. See also *Spies* v. *United States*, 317 U.S. 492 (1943).

York for services allegedly rendered. As a result, Blue Cross overpaid the defendant $585 and passed the overcharges on to the government. Halper was indicted, under the criminal false claims statute (18 U.S.C. 287), convicted and sentenced to a fine and imprisonment. The government thereafter sought to impose a civil penalty against Halper under the civil penalty provisions of the False Claims Act (31 U.S.C. 3729-3731). This Court considered "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purposes of double jeopardy analysis" (490 U.S. at 443) and concluded that a civil penalty of $130,000 was penal in nature because it was "overwhelmingly disproportionate" to the damages caused by the offensive behavior (*id.* at 449).

The analysis applied in *Halper* is inapplicable to this case for two reasons. First, *Halper* involved the imposition of a civil sanction for the same conduct that gave rise to a prior criminal sanction; in this case, the racketeering activity that gave rise to the forfeiture of certain of petitioner's property is unrelated to the conduct for which the additions to tax were imposed. The Court expressly stated in *Halper* that the Fifth Amendment does not "preclude[] the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive." 490 U.S. at 450.

Second, the tax and penalties imposed on petitioner in this case are not "punitive." In *Halper*, the Court specificially endorsed the conclusion in *Helvering* v. *Mitchell* that the civil tax fraud penalty is "in fact remedial," rather than punitive, because it "provid[es]

reimbursement to the Government for investigatory and other costs of the taxpayer's fraud." 490 U.S. at 442-443. The Court emphasized that "in the civil enforcement of [such] a remedial sanction there can be no double jeopardy." *Id.* at 443, quoting *Helvering* v. *Mitchell*, 303 U.S. at 404.

3. Petitioner also errs in contending (Pet. 22-24) that the decision in this case conflicts with *Austin* v. *United States*, 113 S. Ct. 2801 (1993). In *Austin*, the issue was whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. 881(a)(4) and 881(a)(7). In *Austin*, the Court concluded that this statutory forfeiture provision was punitive in nature and was therefore subject to the limitations of the Excessive Fines Clause. 113 S. Ct. at 2812.

The court of appeals correctly held (Pet. App. 10-11) that *Austin* is inapplicable to this case because petitioner has not challenged the forfeiture of his assets. Instead, petitioner consented to that forfeiture as part of his criminal plea agreement (*id.* at 3-4).[4] Moreover, assessing a tax and additions to tax on illegally obtained income is remedial in nature, rather

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[4] Because this case does not involve a challenge to a judicially imposed forfeiture, petitioner errs in relying (Pet. 25) on *United States* v. *Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992), which involved whether a civil forfeiture under 21 U.S.C. 881(a)(7) was punishment. Similarly, *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987), and *United States* v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993), which involved whether forfeitures under 18 U.S.C. 1963 were so grossly disproportionate to the criminal activity involved as to violate the Fifth or Eighth Amendment, have no relevance here.

than punitive, for it is designed to recover the taxes due and to compensate the government for the costs of tax investigation and enforcement activities. *Helvering* v. *Mitchell*, 303 U.S. at 401. This is thus not a case like *Austin*, where history and practice revealed "the punitive nature" of the challenged forfeiture provision. 113 S. Ct. at 2811.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

T.C. Memo. 1993-61

UNITED STATES TAX COURT

THOMAS H. MCNICHOLS, PETITIONER *v.*
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10412-88. Filed February 23, 1993.

Philip M. Giordano and *Arnold N. Pollinger*, for petitioner.
Maureen T. O'Brien and *Louise R. Forbes*, for respondent.

MEMORANDUM OPINION

TANNENWALD, *Judge*: Respondent determined deficiencies in, and addition to, petitioner's Federal income taxes for 1981 and 1982 as follows:

		Additions to Tax			
Year	Deficiency	Sec. 6653(b)			
1981	$251,228	$125,614			
Year	Deficiency	Sec. 6653(b)(1)	Sec. 6653(b)(2)	Sec. 6661	
1982	$453,025	$226,513	50% of the interest due on the deficiency	$113,256	

The issues for decision are whether petitioner: (1) Had unreported taxable income for 1981 and 1982 in the amounts of $503,500 and $906,065 respectively; (2) is liable for the additions to tax for fraud under section 6653(b)[1] ; and (3) is liable for the addition to tax under section 6661 for the taxable year 1982.

This case was submitted fully stipulated pursuant to Rule 122(a). All the stipulated facts are found accordingly. The attached exhibits are incorporated by reference.

Petitioner resided in Boston, Massachusetts, at the time the petition in this case was filed. He filed Federal income tax returns for 1981 and 1982 on the cash basis with the Internal Revenue Service Center, Andover, Massachusetts.

Petitioner was engaged in the importation and sale of marijuana during 1981 and 1982. In connection with such activities, on or about May 25, 1981, petitioner purchased an offshore shell company by the name of Travistock Trading Co., Ltd. (Travistock). A second offshore shell company, Tyler Holding, Ltd. (Tyler), was purchased on or about October 9, 1981. Travistock and Tyler were utilized by petitioner to conceal assets and revenues related to petitioner's illegal drug activities from the knowledge of the U.S. authorities, including the Internal Revenue Service.

During 1981 and 1982, petitioner deposited, or caused to be deposited, the following amounts of money into bank accounts of Travistock and Tyler:

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Year	Travistock	Tyler	Total
1981	$311,000	$192,500	$503,500
1982	39,650	866,415	906,065

Petitioner has stipulated that such amounts constituted income from his illegal drug activities.

For the most part, Travistock and Tyler invested the money in certificates of deposit (CD's) issued by various banks. The CD's, most of which were renewed on one or more occasions, matured during 1981, 1982, and 1983. The precise manner in which such monies ultimately were expended is unclear; it appears, however, that petitioner used the majority of such funds to purchase real property for investment, including a one-third interest in 30 acres on Martha's Vineyard, a one-half interest in three parcels of property on St. Thomas, U.S. Virgin Islands, and two condominiums in Boston, Massachusetts.

Petitioner failed to report as taxable income any portion of the drug revenues deposited into bank accounts of Travistock and Tyler during the 1981 and 1982 taxable years. Likewise, petitioner failed to claim as deductions any expenses incurred in producing such income including costs of drugs sold. In this connection, petitioner did not maintain accurate books or records in respect of his drug-related activities during the taxable years at issue.

In October 1988, petitioner pleaded guilty to a variety of criminal charges relating to the distribution of marijuana, racketeering, criminal enterprise, conspiracy to defraud the United States, and subscribing to false tax returns. As a result, petitioner was sentenced to 10 years' imprisonment and is now serving that sentence. Pursuant to a plea agreement entered into between petitioner and the U.S. Attorney for the District of Massachusetts in a related criminal case,

petitioner also forfeited substantial amounts of money and properties.

Initially, petitioner contends that the burden of proof is on respondent to establish that petitioner's unreported income, namely, the deposits into Travistock and Tyler during 1981 and 1982, was net of deductible expenses, including costs of the drugs sold. According to petitioner, "Respondent in its answer, * * * for the first time, * * * implies that Petitioner had no expenses paid from Travistock and Tyler, and that such stipulated deposits to the Petitioner were net of expenses from Travistock and Tyler." Petitioner therefore claims that respondent raised a new matter with respect to which respondent bears the burden of proof. We disagree.

In the answer, respondent simply denied error in not determining itemized deductions, credits, or offsets against the unreported income of petitioner for 1981 and 1982, as the petition alleged. Respondent's position in no way establishes a new matter which would shift the burden of proof to respondent under Rule 142(a) with respect to whether the amounts determined as income were net of expenses, insofar as the underlying deficiencies are concerned. That burden requires petitioner to show that the amounts determined for income in the notice of deficiency were not includable in income (petitioner has conceded that they were) or that they were offset by allowable deductions. *Welch v. Helvering*, 290 U.S. 111 (1933); *Flint v. Commissioner*, T.C. Memo. 1991-405 (costs of goods sold). Petitioner's attempt to transform his deductions, credits, or offsets in his "new matter" argument into a further position that respondent has the burden of proving that the determinations of income in the notice of deficiency were not arbitrary and capricious is equally without merit.

Recognizing that "the burden of proof may fall on petitioner", petitioner alternatively contends that he has met his burden of proof in respect of the deductibility of various expenditures by Travistock and Tyler in 1981 and 1982 totaling approximately $7,200. According to petitioner, such expenditures were incurred, and paid, in the ordinary course of his drug business and, as such, are deductible under section 162. Petitioner therefore asserts that the failure to allow these expenditures is a further ground for concluding that respondent's deficiency determinations were arbitrary and capricious. Again, we disagree.

There is no indication that such expenditures were related to petitioner's importation and/or sale of marijuana; rather the record indicates that they apparently were incurred for purposes of concealing revenues generated from petitioner's drug business and investing such revenues in CD's. In essence, such expenditures were at best expenses of Travistock and Tyler. As such there is no basis for allowing them as deductions to petitioner. Travistock and Tyler were created as separate entities by petitioner, and their separateness has not been disputed by respondent.[2] The record herein is utterly devoid of any evidence which would permit us to accept petitioner's argument that Travistock and Tyler were his alter egos and therefore fall within the narrow exception to the doctrine established by *Moline Properties v. Commissioner*, 319 U.S. 436 (1943). See *First Chicago Corp. v. Commissioner*, 96 T.C. 421, 444 et seq. (1991). In this connection, we not that the fact that the instant case is fully stipulated

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[2] We note that the deficiency notice does not include any interest from CD's in petitioner's income.

does not lessen either party's burden of proof. *Borchers v. Commissioner*, 95 T.C. 82, 91 (1990), affd. 943 F.2d 22 (8th Cir. 1991).

With respect to the additions to tax for fraud under section 6653(b),[3] we must determine whether respondent's burden of proof has been satisfied. That burden requires respondent to establish that there has been an underpayment, that some part of the underpayment was due to fraud (section 6653(b) and 6653(b)(1)), and the portion of the underpayment due to fraud (section 6653(b)(2)). See *DiLeo v. Commissioner*, 96 T.C. 858, 873 (1991), affd. 959 F.2d 16 (2d Cir. 1992).

With respect to the 50-percent addition to tax, the answer is clearly in the affirmative since petitioner has stipulated: (a) He failed to report income in the amounts set forth in the notice of deficiency; (b) he "fraudulently, and with intent to evade tax omitted taxable income from his federal income tax returns for the taxable years 1981 and 1982", and (c) "a part of the underpayment of tax which was required to be

[3] For the 1981 taxable year, sec. 6653(b) provided in part:

> (b) Fraud.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

For the 1982 taxable year, sec. 6653(b) became sec. 6653(b)(1) and (2), with sec. 6653(b)(1) retaining language identical to that of prior sec. 6653(b). New sec. 6653(b)(2) provided in part:

> (2) Additional amount for portion attributable to fraud.—There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601—
>
> (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to fraud, * * *

shown on petitioner's federal income tax returns for the taxable years 1981 and 1982 was due to fraud". Under these circumstances, we need not, for the purposes of the 50-percent addition to tax, examine the question of respondent's burden of proof in respect of the existence of deductions, credits, etc. Cf. *United States v. Bender*, 218 F.2d 869, 871-872 (7th Cir. 1955); *Rivera v. Commissioner*, T.C. Memo. 1979-343, and cases cited therein. Accordingly, such addition to tax attaches to the entire deficiency.

With respect to the addition to tax imposed by section 6653(b)(2), the question is the extent of respondent's burden of proof as to "the portion of the underpayment * * * which is attributable to fraud" when, as is the case herein, the taxpayer claims that there are offsetting deductions. In the cases dealing with the obligation of respondent to negate such deductions and credits in respect of the addition to tax under section 6653(b)(1), it is clear that if respondent establishes that the taxpayer had unreported income, such addition to tax attaches to the amount of such income unless the taxpayer comes forward with evidence as to the claimed deductions, in which event the burden of proof to disprove such deductions rests with respondent. Compare *United States v. Bender*, *supra*, and the cases cited in *Rivera v. Commissioner*, *supra* (there was no such evidence), with *Richardson v. Commissioner*, 264 F.2d 400, 404-405 (4th Cir. 1959), modifying T.C. Memo. 1957-122, and *Perez v. Commissioner*, T.C. Memo. 1974-211 (there was some evidence). We think the reasoning which underpins this position, namely the difficulty of the Government to show a negative, also applies to the addition to tax under section 6653(b)(2). Given petitioner's stipulation that he had income from illegal drug activities in the amounts set forth in the

deficiency notice, that he had unreported taxable income and that a part of the underpayments was due to fraud, coupled with his failure to offer any evidence of deductions (including cost of goods sold) to which he may have been entitled, we think that, under the principles enunciated in *United States v. Bender*, *supra*,[4] respondent's burden of proof has been satisfied. Accordingly, we hold that the addition to tax under section 6653(b)(2) applies to the entire underpayment as determined in the notice of deficiency.

We now turn to petitioner's contention that the imposition of the deficiencies and additions to tax, including the additions to tax for fraud, in respect of income which has been forfeited to the Government, constitutes double jeopardy under the Fifth Amendment and an excessive fine under the Eighth Amendment.[5] We considered petitioner's constitutional arguments in *McNichols v. Commissioner*, T.C. Memo. 1992-120, and concluded that the instant case was controlled by *Ianniello v. Commissioner*, 98 T.C. 165 (1992), wherein this Court held that such imposition of taxes, and additions to taxes, did not violate the taxpayers' constitutional rights.

Petitioner fails to recognize that the various forfeitures to which he has been subjected relate to conviction for crimes separate and distinct from the charge of fraudulent tax evasion under section

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[4] See also *Fifer v. Commissioner*, T.C. Memo. 1993-44.

[5] Petitioner also contends for the first time in his opening brief that the imposition of taxes and additions to taxes on income forfeited to the Federal Government violates the Due Process and Equal Protection Clauses of the 5th and 14th Amendments. Such issues, having been raised for the first time on brief, are untimely, and we decline to give them consideration. See, e.g., *Krause v. Commissioner*, 99 T.C. 132, 176 (1992).

6653(b). Indeed, even the tax crimes for which he was convicted were for subscribing to false tax returns under section 7206(1), which is a different crime from tax evasion under section 7201, the counterpart of section 6653(b). See *Wright v. Commissioner*, 84 T.C. 636 (1985) (holding that a conviction under section 7206(1), in contrast to a conviction under section 7201, does not operate as collateral estoppel).

Petitioner's emphasis on the absence of proof by respondent of the costs for which the additions to tax for fraud are considered reimbursement is misplaced. Although *Ianniello v. Commissioner*, *supra* at 183, indicates that there was some evidence of such costs in that case, the Court made it clear that proof of costs was not a necessary element of the addition to tax under section 6653(b). Similarly, we do not accept petitioner's suggestion that some significance attaches to the fact that Congress has used the word "penalty" to describe the statutorily designated "addition to tax". Not only does the "penalty" description coincide with a semantical course of judicial and legislative expressions over many years which contain no evidence that a substantive difference from "addition to tax" was intended, but even when Congress actually so changed the designation in enacting the present section 6662, there is nothing to indicate that it had any substantive change in mind.

Under the foregoing circumstances, petitioner's attempt to distinguish *Ianniello v. Commissioner*, *supra*, from the instant case on grounds that the deficiencies and additions to tax herein are much greater is unavailing. Thus, petitioner's constitutional arguments again must fail.[6]

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[6] We note that it appears that, under the plea agreement, the monies, i.e., cash, forfeited by petitioner in the amount of

Finally, we consider the impact of section 6661, which imposes an addition to tax of 10 percent of the amount of any underpayment which is attributable to a substantial understatement of income tax. The amount of the understatement is reduced by the portion which is attributable to: (1) The tax treatment of any item if there is or was substantial authority for such treatment, or (2) any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. Sec. 6661(b)(2)(B). Petitioner has presented no evidence of any such substantial authority. His contention that such authority exists in his constitutional arguments is without merit. Nor has he shown that he adequately disclosed the relevant facts affecting his treatment of such income. Indeed, he has stipulated that the amounts determined by respondent were not included in his returns for 1981 and 1982, i.e., *total nondisclosure*. Accordingly, respondent's determination under section 6661 is sustained.

Decision will be entered for respondent.

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at least $600,000 are to be applied to any deficiencies, including additions to tax, determined in this case.

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